Summary of SC94680, *Byrne & Jones Enterprises Inc. d/b/a Byrne and Jones Construction v. Monroe City R-1 School District*

Appeal from the Monroe County circuit court, Judge Rachel Bringer Shepherd
Argued and submitted April 22, 2015; opinion issued July 26, 2016

Attorneys: Byrne & Jones was represented by W. Dudley McCarter and Andrew Kriegshauser of Behr, McCarter & Potter PC in St. Louis, (314) 862-3800; and the school district was represented by Ira M. Potter of Affinity Law Group LLC in St. Louis, (314) 872-3333.

Overview: A construction company appeals a judgment dismissing its petition alleging a school district's bidding process was unfair. In a decision written by Chief Justice Patricia Breckenridge and joined by four other judges, the Supreme Court of Missouri affirms the judgment. Judge Paul C. Wilson concurs in result in an opinion joined by one other judge.

All seven judges agree the circuit court properly dismissed the company's petition because the company was not entitled to the relief it requested. All seven judges agree that the relevant statute does not provide for recovery of the costs the company claimed. Five judges agree that the company's claim for injunctive relief, if it were not moot, would have been proper. Although unsuccessful bidders usually do not have standing (legal ability to sue) to challenge the award of a public contract to another bidder, the construction company was alleging the bidding process did not provide it a fair and equal opportunity to compete and, therefore, it did have standing to challenge the award of the contract on those grounds. Two judges, however, would hold that it is sufficient to note that the statute does not provide for recovery of costs the company claimed and that its claim for injunctive relief is moot as the stadium has been built. On this basis, the Court's further discussion regarding standing was dicta that should not be followed in future cases.

Facts: ATG Sports Inc. assisted the Monroe City R-1 School District in planning a new athletics stadium at Monroe City High School. The school district ultimately solicited bids for the project. Only two bids were submitted – by ATG and by Byrne & Jones Enterprises Inc. The district awarded the contract to ATG. Byrne & Jones filed suit, seeking a judgment declaring that the bidding procedures the district used did not allow all bidders a fair opportunity to compete on equal terms with ATG and that the district violated the competitive bidding process prescribed by section 177.086, RSMo, by colluding with and acting with favoritism toward ATG. The relief Byrne & Jones sought was an injunction preventing the district from entering into a contract with ATG as well as an award of costs, attorney fees and costs incurred in preparing its bid for the project. The circuit court dismissed Byrne & Jones' petition, finding that a low bidder has no standing under section 177.086 to challenge the award of the contract to another bidder and that Byrne & Jones was bringing the action as an unsuccessful bidder, not as a representative of district taxpayers. Byrne & Jones appeals.

AFFIRMED.

Court en banc holds: (1) Byrne & Jones had standing to challenge the district's award of the contract to ATG because Byrne & Jones alleged the district's favoritism toward and collusion with ATG prevented Byrne & Jones from having a fair and equal opportunity to compete. Section 177.086 sets out the competitive bidding procedures for all school districts regarding facility construction expenditures. Under this competitive bidding scheme, the district reserves the right to reject any and all bids, including the lowest bid submitted. Generally, Missouri courts have held that an unsuccessful bidder competing for a public contract has no special pecuniary interest in the award of a contract to it and, therefore, lacks standing to challenge the award of a contract to another bidder. Recent precedent from the United States Court of Appeals for the Eighth Circuit – in its 1994 decision in *Metropolitan Express Services Inc. v. City of Kansas City, Mo.* – and the Missouri Court of Appeals – in its 2013 decision in *Public Communications Services Inc. v. Simmons* and its 2014 decision in *Brannum v. City of Poplar Bluff* – establishes that, although an unsuccessful bidder typically lacks standing to challenge the award of a public contract to another bidder, an unsuccessful bidder does have standing to raise such a challenge on grounds that it was denied a fair and equal opportunity to compete in the bidding process. This Court's 1936 decision in *State ex rel. Johnson v. Sevier* and the 1976 appeals court decision in *La Mar Construction Company v. Holt County R-II School District* were made in the context of dispelling the notion that the unsuccessful bidder, as the lowest or best bidder, has some statutory right or interest in having the contract awarded to it and held that the unsuccessful bidder cannot bring an action to compel the award of a public contract to it. Therefore, these holdings do not conflict with the proposition that unsuccessful bidders have standing to challenge a public contract on grounds that they were denied a fair and equal opportunity to compete in the bidding process. All bidders have a legally protectable interest in a fair and equal bidding process and are within the zone of interests that the school district's competitive bidding statutes seek to regulate. These statutes are designed to ensure that all bidders have a fair and equal opportunity to compete in the bidding process. As such, unsuccessful bidders that are denied a fair and equal opportunity to compete in a public bidding process have standing to challenge the award of the contract.

(2) The circuit court did not err in dismissing Byrne & Jones' petition because the company was not entitled to the relief it requested. As the company conceded in oral argument, it did not seek a preliminary injunction or temporary restraining order to prevent the school district from entering into the contract with ATG. The district and ATG, therefore, entered into a contract, resulting in ATG building the athletics stadium now in use at Monroe City High School. Because the project is complete, there is nothing left to enjoin; therefore, Byrne & Jones' request for an injunction is moot. In addition, Byrne & Jones is not entitled to recover its bid preparation costs under the statute. Section 177.086 provides no authority for such a cause of action or recovery of such damages.

Opinion concurring in result by Judge Wilson: The author agrees the circuit court correctly dismissed the petition but believes its reasoning was overbroad. The principal opinion properly holds that Byrne & Jones' claim for bid preparation costs should have been dismissed for failure to state a claim because such a claim is not expressly provided for in section 177.086. The company's only other claim was seeking an injunction to prevent the district from going forward with its construction project on the basis of the contract the district awarded to ATG. The author would hold the Court should not reach the question of whether Byrne & Jones has standing to

bring such a claim because the company's claim for injunctive relief is moot as the relief it sought no longer is available. The author believes the principal opinion's further discussion – about why, had Byrne & Jones' claim for injunctive relief not been moot, the company should have had standing to pursue it – is dicta that should not be followed in future cases.

State bidding statutes such as section 177.086 are enacted to protect the public, not the bidders, and longstanding precedent holds that only taxpayers have standing to enforce those laws once a contract is awarded. This Court more than a century ago – in its 1894 decision in *Anderson v. Board, etc., of Public Schools* and its 1915 decision in *State ex rel. Doniphan State Bank v. Harris* – rejected claims that an alleged violation of section 177.086 gives an unsuccessful bidder a legally protectable interest sufficient to give it standing to seek an injunction to prevent a public contract from proceeding. These cases formed the basis for this Court's 1936 decision in *State ex rel. Johnson v. Sevier*, which remains this Court's leading decision about standing to enforce public bidding laws – when a losing bidder is not also a taxpayer, the losing bidder lacks standing to challenge the award of a public contract to another based on a violation of public bidding laws. If a public entity has authority to reject any or all bids, a losing bidder has no legally protectable interest in the outcome of the bidding process. Further, Byrne & Jones' petition alleges flaws not in the bidding process but in the district's award of the contract – that the district acted arbitrarily, capriciously, unfairly and in violation of the competitive bidding process, as well as in collusion with ATG and with personal favoritism for ATG, in *awarding* the contract to ATG. Nothing in section 177.086 draws a distinction between the bidding process and the award of a contract – the law's requirements concern process and are imposed solely for the benefit and protection of the public, not bidders. Only the public, through representative taxpayers, has standing after the contract is awarded to enforce the bidding laws. The Eighth Circuit's decision in *Metropolitan Express Services Inc. v. City of Kansas City, Mo.* misstates Missouri law on this issue. Whether a losing bidder should have standing to seek an injunction based on alleged violations of state bidding laws after the contract has been awarded is an issue for the legislative process, not a judicial one.